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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,

Defendant-in-Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF-IN-ERROR.

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STATEMENT.

The plaintiff-in-error, Frank Gatt, Angelo Mustillo, John Gatt and William Parent, were charged in an information containing four counts. The first count charged that the four defendants possessed certain intoxicating liquor; count II charged the plaintiff-in-error, Frank Gatt, with a prior conviction of possessing intoxicating liquor; count III charged Angelo Mustillo with a prior conviction of possessing intoxicating liquor, and count IV charged all of the defendants with maintaining a common nuisance (Tr. pp. 2-5).

The plaintiff-in-error was found guilty on counts I, II and IV; Angelo Mustillo was found guilty on counts I, III and IV (Tr. p. 9).

A directed verdict was granted as to the defendant John Gatt (Tr. p. 37). William Parent, the remaining defendant, was not tried.

ASSIGNMENTS OF ERROR.

I.

That the court erred in admitting the documents seized at Lake View Inn.

II.

That the court erred in admitting the lumber bill.

III.

That the court erred in permitting on cross-examination testimony as to the nationality of the codefendant Parent (Tr. p. 16).

IV.

That the court erred in denying the motion for a directed verdict.

V.

That the court erred in denying the motion for a new trial.

VI.

The court erred in entering judgment and sentence upon the verdict.

VII.

The court erred in admitting evidence as to telephone conversations and reputed ownership (Tr. p. 14).

ARGUMENT.

Gordon B. O'Hara testified on behalf of the Government that on November 11th, 1923, armed with a search warrant he visited the place described in the information as Lakeview Inn and found the intoxicating liquor set out in count I of the information; that Mustillo was found on the premises as was the defendant William Parent. He also testified that in the search he found certain papers on Mustillo, and in the room occupied by him. Over objection he testified that the Gatt brothers were the owners of the premises. On cross-examination he testified as follows:

> "Q. When you say the Gatts owned the place, what facts do you base that upon,—I mean of your own knowledge?
>
> A. Well, more from the reputation of the place.
>
> Q. You mean that you heard people say that the Gatts owned it?
>
> A. Yes, people out in that neighborhood.
>
> Q. You heard people out in that neighborhood say that John and Frank Gatt owned it? Did they mention both of them?

A. Both of them, the Gatt Brothers, on the same line; yes.

Q. Gatt Brothers?

A. Yes, sir.

Q. That is what you base your answer on, was on reports?

A. Yes, sir, and on papers we got out of the defendants.

MR. DORE: I suggest that the Gatt Brothers owned the place be stricken on the ground that it is based on hearsay.

THE COURT: That is part of the proof of ownership, that those who are reputed to be owners in respect to all property are presumed to be is the law in many states by statute. Motion denied. Exception allowed." (Tr. p. 26).

Charles R. McFarland, a Government witness, testified that sometime in the fall of 1923 he sold the Gatt brothers $2.84 worth of lumber which was delivered at Lakeview Inn; that he recognized the plaintiff-in-error, Frank Gatt, as the person who ordered the lumber (Tr. p. 27).

William M. Whitney testified that he was one of the officers in the raid; that the defendant Parent and a Japanese woman and Mustillo were there

at the time that the liquor described in count I of the information was found on the place; that in the cash register was found Government's Exhibit No. 4, being N. S. F. checks and put through the bank by the plaintiff-in-error, Frank Gatt; that Mustillo was an employee and stated at that time that he was responsible for serving the liquor (Tr. p. 28). This witness was recalled and testified as follows:

> "I know that the defendants Gatt own the place because I have been told so.
>
> MR. DORE: I move that be stricken as hearsay, and the jury instructed to disregard it.
> THE COURT: Denied. We know the Government owns this building. We know it by reputation. We didn't see the title deeds of anything of that sort. A disputable presumption of ownership arises from common reputation of ownership. An exception is allowed." (Tr. p. 32).

Walter M. Justi testified that he was present on November 11th, 1923, and:

> "Q. I will ask you if you know who the proprietors of that place are?
>
> A. Mr. John Gatt and Mr. Frank Gatt."

Objected to on the ground that it is hearsay. Objection overruled. Exception noted.

CROSS-EXAMINATION.

"I know that they were the owners because I have been told so by telephone reports. I could not identify the people on the telephone. I don't know what month it was I had the telephone conversations. It was in the year 1923. Somebody called up on the telephone and said the Lakeview Inn was selling booze and was being operated by Frank Gatt and John Gatt. The person telephoning did not give his name. I do not know the name of any of the persons. I got from three to six telephone calls during the year 1923.

MR. DORE: I move that the testimony of this witness be stricken (Tr. p. 31).

THE COURT: Motion denied.

An exception noted (Tr. p. 31)."

The prior convictions were admitted.

A motion for a directed verdict was made by all of the defendants at the close of the Government's case which was denied and an exception noted (Tr. p. 32).

Mustillo testified that he was employed at the Lakeview Inn as janitor to take care of the grounds outside; that he had nothing to do with the place; that he had worked there seven months prior to the date of his arrest and that he was employed by

the defendant William Parent; that he never saw the papers that were in his room and that they were not in his handwriting; that he never owned any liquor on the place (Tr. p. 32).

The plaintiff-in-error, Frank Gatt, testified that he was in the restaurant and barber business and had owned the Monte Carlo at 5th and Jackson for five years; that he never bought any lumber from the McFarland Lumber Company and was never in their office in his life; that he had nothing to do with the Lakeview Inn; that he collected money there for James Lochnane, the owner of the property; that he had loaned James Lochnane six hundred ($600.00) dollars with the understanding that he was to get it back from the rent of the Lakeview Inn; that the cancelled checks returned from the bank endorsed Frank Gatt were his signature; that Parent had turned them in on the rent of the property and that he put them through the bank and when they came back N. S. F. he had turned them back to Parent who paid him cash for them; that he owned no liquor at the Lakeview Inn and absolutely had nothing to do with the place; that he collected the rent and applied it on Lochnane's debt until he was paid (Tr. p. 33).

John Gatt testified that he never had any interest in the Lakeview Inn and that he never bought or received any lumber for the place and on cross-examination was asked the following questions:

"Q. What is Parent's nationality, if you know?

MR. DORE: I object to that as incompetent, irrelevant and immaterial, the nationality of any defendant.

THE COURT: I think I can see the purpose; it is cross-examination; he may answer.

An exception noted.

A. Italian.

Same objection, same ruling, and an exception noted.

Q. What is yours?

A. Italian." (Tr. p. 35.)

James Lochnane testified that he was the owner of the land and building; that he leased it in 1922 and 1923 to a man named Valenti; that Billie Parent was the manager; that he never had any dealings with the plaintiff-in-error, Frank Gatt, except to borrow money from him, and Gatt collected the rent to pay back his note (Tr. p. 36).

At the close of all the evidence, the defendants moved for a directed verdict. It was granted as to John Gatt but denied as to the other defendants.

An examination of the testimony given by the Government agents as set out heretofore in this brief will show that the attempt on the part of the Government to connect Frank Gatt with this place was all hearsay evidence. O'Hara's testimony is based upon what people in the neighborhood told him. Whitney says "that he was told." Justi testified to telephone conversations in which he frankly admits he did not know who was talking and did not know what time of the year said conversations occurred. It is true that the witness McFarland identified Frank Gatt as the person to whom he sold $2.84 worth of lumber sometime in the fall of 1923, which lumber was delivered at the Lakeview Inn, and that in the cash register was found certain N. S. F. checks endorsed by Gatt, but nowhere in the record is there to be found any evidence that any human being ever saw the plaintiff-in-error, Frank Gatt, upon these premises, or in any way tending to show that he had anything to do with the management of the same. In other words, there is no substantial evidence that he was

guilty of the crimes charged in the information. The introduction of this hearsay testimony was error. Ownership cannot be proved by reputation.

In *Katz vs. Commissioner of Immigration,* 245 Fed. 316, affidavits were introduced alleging it was a well-known fact that the petitioner was interested in and was associated with the house and it was a generally known fact that Katz conducted, managed and directed the particular house, and this court said:

> "These affidavits and protests contain the strongest showing made against Joseph Katz respecting his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record, is that it is wholly hearsay and based upon common repute in the vicinity; the affiants generally asseverating upon information and belief. There is practically no substantive testimony of fact. Locally—that is, in the State of California—the fact that a house is being conducted as a house of ill fame may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven. Of course, if it were shown that Joseph Katz was conducting or managing such a house, it would be a reasonable inference and deduction that he was taking the earnings of the inmates. There is not a syllable of testimony that he accepted

> such earnings, except that he was the owner of the house and accepted rentals from the occupant, which in itself, as we have seen, is not sufficient to condemn him under the charge. Some substantive evidence of the fact of managing and conducting such a house, besides mere hearsay and expression of opinion and belief (which is practically the equivalent of no competent evidence of the fact sought to be proven), is necessary upon which to base the inference of his having taken the earnings of the inmates."

In *Backus, Commissioner of Immigration, vs. Katz,* 245 Fed. 320, the evidence tended to show that Katz frequently visited the house many times a day; that he superintended the alterations and repairs; that he was seen taking parcels into the house and it was commonly understood that he conducted and managed this house and that the woman living in the house was known as Nellie Katz and as the Katz woman. This court said:

> "There is no substantive proof in the record competent to establish the fact alleged that appellant received or was receiving the earnings of a prostitute. The *Joseph B. Katz* case is therefore decisive of this, and the judgment of the District Court will be affirmed."

In *Crippen vs. State,* 80 S. W. 372, it was held:

> "We do not believe it was competent, as was done in this case, to show by witnesses that

the house and business were reputed to belong to defendant. Ownership cannot be proved in this way."

In *Perkins vs. City of Roswell,* 113 Pac. 609, it was contended that it was common knowledge in the neighborhood that the defendant was running a sanatorium, but the court held:

"Ownership or possession of property or a modus concerning it cannot be shown by reputation." 16 Cyc. 1212. "Title cannot be proved by neighborhood talk."

In *Henry vs. Brown,* 39 So. 328 (Ala.), the Supreme Court of Alabama said:

"It is never competent to prove ownership by reputation or general understanding."

In *South School District vs. Blakeslee,* 13 Conn. 227, it is held:

"A man's general character may be proved by reputation, but not his title to real estate."

In *Green vs. Chelsea,* 24 Pick. 80, the Supreme Court of Massachusetts said:

"Reputation is never evidence of title nor is it ever admissible to support private rights."

Schooler vs. State, 57 Ind. 127.

Steed vs. State, 67 S. W. 328.

Minter vs. State, 150 S. W. 783.

Greenleaf on Evi., Sec. 137.

3 Wigmore on Evi., 2nd ed., Sec. 1587.

16 Cyc. 1211.

Moore vs. Jones, 13 Ala. 303.

Goodson vs. Brothers, 20 So. 443.

Doe vs. Edmondson, 40 So. 505.

Howland vs. Crocker, 7 Allen 153.

Heirs vs. Risher, 32 S. E. 509.

Sexton vs. Hollis, 1 S. E. 893.

Wendell vs. Abbott, 45 N. H. 349.

The rulings of the court in the presence of the jury on the objection to the introduction of this hearsay or reputation evidence was error, for in the presence of the jury he stated:

> "That is part of the proof of ownership, that those who are reputed to be the owners in respect to all property, are presumed to be is the law in many states by statute."

This remark was highly prejudicial—there is no United States statute which allows ownership of property to be proven by reputation.

Again:

"THE COURT: Denied. We know the Government owns this building. We know it by reputation. We didn't see the title deeds of anything of that sort. A disputable presumption of ownership arises from common reputation of ownership.

An exception is allowed."

These statements are not the law, in fact the rule is otherwise—ownership or title cannot be proven by reputation.

Katz vs. Commissioner of Immigration, and cases cited, *supra.*

This last statement was error and if for no other reason than that the illustration was far fetched, in that, nearly every department of the Federal Government is housed in what is known as the Federal Building, its officers and agents are there and carved in stone on the building is "U. S. Court House—Customs House—Post Office," but in this case no one ever saw the plaintiff-in-error on the premises described in the information.

The defendant Parent was not on trial, yet the court, over objection, allowed the Government to prove Parent's nationality. It was improper under any circumstances, yet the court in ruling stated:

"I think I can see the purpose—it is cross-examination." It was not cross-examination because the witness, John Gatt, had not testified anything about Parent, his nationality or otherwise. It was prejudicial because it was an attempt by innuendo to place all of these defendants in one class; it had no place in the record.

The plaintiff-in-error's motion for a directed verdict at the end of all the evidence should have been granted. The court granted a directed verdict as to the defendant John Gatt. An examination of the record will show that the only difference in the evidence against the plaintiff-in-error, Frank Gatt, and the defendant John Gatt is that Frank Gatt was supposed to have ordered some lumber for the Lakeview Inn and John Gatt was supposed to have received it. Both defendants denied any knowledge of any such transaction. The other difference is that in the cash register there were found certain N. S. F. checks endorsed by the plaintiff-in-error, Frank Gatt. He explained that these checks were for rent and were turned over to him by Parent who was running the place in payment of a debt that the owner of this property owed him, and that he had put them through the bank and when they came

back he had turned them back for cash. Lochnane, the owner, also testified as to this arrangement that Gatt was to collect the rent.

In view of the fact that there is not any competent evidence in the record that Frank Gatt ever had anything to do with this place and the fact that his explanation of these checks was not questioned, and the record being in this condition, it is our contention that the inference of innocence would be fully as justified as the inference of guilt, and under these circumstances it was the duty of the court to grant a motion for a directed verdict. In other words, taking the evidence as a whole and assuming it to be true, together with all reasonable inferences, it is not legally sufficient to support a verdict of guilty, because the circumstances relied on as the evidence of guilt are equally susceptible of inference favorable to innocence.

In *United States vs. Murphy,* 253 Fed. 404, certain letters were introduced by the Government and the court in granting a motion for a directed verdict said:

> "What inference will one draw from the statements contained in all the letters? They

> may be innocent, they may be sinister; but no trier of a criminal cause may be allowed to guess."

So in this case, the ordering of the lumber, if Gatt did order it, and the endorsement of the checks are susceptible of an inference of innocence and his explanation and that of Lochnane supports this inference.

Nosowitz vs. United States, 282 Fed. 575.

Union Pacific Coal Co. vs. United States, 173 Fed. 737.

Sullivan vs. United States, 283 Fed. 865.

Hayes vs. United States, 169 Fed. 101.

France vs. United States, 164 U. S. 674.

We respectfully submit that plaintiff-in-error's motion for a directed verdict should have been granted and that it was error for the lower court not to grant it, and that said case should also be reversed because of the introduction of incompetent hearsay evidence.

Respectfully submitted,
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